
On the Types of Risk and Prevention of the Investigation Procedure of Supervisory Commission in China

Ren Mei^{1, *}, Liu Tongjun²

¹Secretary of the Principal's Office, Jiangsu University, Zhenjiang, China

²Law School, Jiangsu University, Zhenjiang, China

Email address:

meiren@ujs.edu.cn (Ren Mei)

*Corresponding author

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Abstract: The Supervisory Committee is an important part of China's criminal justice reform. The investigative power of the Supervisory Committee has attracted many people's attention. It established a single-track investigation system that integrates party discipline investigation power, political discipline investigation power and criminal investigation power. This system confuses the boundaries and differences of the three types of investigations, reduces the level of legalization of criminal investigations, and makes criminal investigations with investigative nature not restricted by the Criminal Procedure Law, nor can they provide the person under investigation with a minimum Procedure guarantee. In the present investigation procedure, there are some hidden risks in the right to defense by attorney, coercive measures, supervision by procuratorate and the possible formation of supervisory centralism. The investigation procedure of supervisory committee should be optimized through internal control and external supervision, so as to prevent legal risks in the investigation operation of supervisory committee. From an internal point of view, internal control should be strengthened, especially the supervision of the People's Congress over the power of investigation procedures. In China, as a legal supervision agency, the procuratorate is also expected to play a greater role in restraining and balancing the supervision committee. From an external point of view, we must focus on the role of lawyers, especially in protecting the lawyer's right to defense.

Keywords: Risk Type, Supervisory Commission, Investigation Procedure, Optimization

1. Introduction

In March 2018, the adoption of the Amendment of the Constitution and the promulgation of the Supervision Law of the People's Republic of China marked that, the reform of China's supervision system has entered a stage of comprehensive promotion.

This Supervision Law gives the supervisory committee the responsibility of supervision, investigation and disposal. Among them, the investigative power of the Supervisory Committee is its key function to strengthen the supervision of public officials, achieve full coverage of anti-corruption, and effectively handle corruption cases. In addition to restricting personal freedom mainly through lien measures, the investigative power of the supervisory committee and the criminal investigation power have similar forms and

consequences.

However, in the process of reforming the supervision system, reform decision makers have repeatedly emphasized that the supervision committee is neither a judicial organ nor an administrative organ, but a special "political organ"; the investigation of the supervision committee does not have an investigative nature and is not subject to investigation, and not be regulated by the Criminal Procedure Law; during the investigation process of the Supervisory Committee, defense lawyers shall not participate in the investigation activities or provide legal assistance to the persons under investigation; if the Supervisory Committee adopts detention measures, the place of detention shall be statutory Place of retention.

This view that denies the investigative power of the Supervisory Committee is the investigative power has caused widespread controversy in the legal field. Except for a very small number of scholars involved in the reform of the

supervisory system that agree with the views of the reform of the decision-making department, the vast majority of legal scholars believe that the argument that the supervisory committee does not exercise the power of investigation is difficult to establish, and they also hold that the investigation of the supervisory committee does not implement the criminal procedure law. Be reserved. Some scholars pointed out that the investigation of the Supervisory Committee has the facts of investigation, and all the evidence materials collected can be directly transferred to the procuratorial organ as evidence for accusations of crimes. This kind of investigation not only deprives the person under investigation of personal freedom, but also violates the legal rights and interests such as property rights. This kind of investigation is not restricted by the Criminal Procedure Law, which is equivalent to breaking away from effective legal control and not subject to the rules of exclusion of illegal evidence. It cannot guarantee the basic right of defense of the person under investigation, and even leads to the circumvention of statutory filing and registration of all duty crime cases. Investigation procedures. Some scholars even directly suggested that the Supervisory Committee should implement the provisions of the Criminal Procedure Law during the investigation process and that the person under investigation should obtain the help of a lawyer.

The reformed national supervision system still faces many specific problems in its operation, so it is necessary to sum up the experiences and lessons and seriously study and solve them in combination with the actual operation of the national supervision system. Among them, the potential risks of the commission's investigation process in the right to defense by attorney and coercive measures are concerned. This paper starts with the legal theory of risk control, analyzes and explains the risk problems of the investigation procedure of supervisory commission, and on this basis, puts forward the possible measures to optimize the investigation procedure of supervisory commission.

2. The Types of Risks of the Supervisory Commission in Investigation Procedure Practice

The exercise of the power of investigation by supervisory commissions is an important part of the reform of national supervisory system, and is also one of the focal points of the legislation of the Supervision Law. In the provision of the Supervision Law about supervisory commissions power of investigation, it is clear that inspecting investigation procedure stipulated by the supervisory committee is not only different from the detection procedure but also general administrative investigation procedures. To some extent, it is a set of program rules which absorb the content of both programs but have their own independent program characteristics. With the revision of the Criminal Procedure Law, some parts of the investigation procedure of the supervisory commission will be adjusted accordingly. There are procedural risks in the investigation procedure of

supervisory commission in the following aspects.

2.1. The Types of Risks of the Supervisory Commission in Investigation Procedure Practice

The supervision law, does not expressly forbid lawyers access to defence proceedings in the investigation of supervisory commission as defenders. But in the practice, the lawyer in the stage of investigation cannot be realized. [1] This is mainly due to the following reasons. First, since the reform of the national supervision system, lawyers could not begin his defence in the investigation by the supervisory commission. Zhejiang and Shanxi provinces, both pilot regions, have excluded lawyers from the commission's investigation phase on the basis of local documents.

Secondly, some scholars argued that, lawyers should not get involved in the investigation of supervisory commission. For example, some scholars argued that, the investigation procedure of stipulated in the Supervision Law is a special procedure, which is different from the investigation procedure of other criminal cases stipulated in the Criminal Procedure Law. The special procedure is different from ordinary criminal procedure in that, it takes combating corruption as its primary consideration [2]. Some scholars also pointed out that, although lawyers should be allowed to intervene from the perspective of human rights protection, considering the difference between the detection power and the investigative power of the supervisory commission, it should be treated with caution. As the investigation procedure is not a criminal procedure, careful consideration should also be given to the time and manner in which the subject under investigation obtains the right to defense [3].

Thirdly, the technical problems exist in the Supervision Law. If a lawyer wants to intervene in the investigation of a commission, he should do so in accordance with the first paragraph of Article 33 of the Criminal Procedure Law. This article stipulates that "a criminal suspect shall have the right to entrust a defender from the day when he is interrogated for the first time by an investigation organ or when compulsory measures are taken [4, 5]." However, the Supervision Law, in terms of the investigation procedure of the supervision commission, stipulates that, the investigation and criminal investigation of the investigated objects can be mixed together. After the preliminary examination, the investigation can be launched after the procedure of placing a case on file. However, such investigation cannot determine whether it is supervision investigation or a criminal investigation. "In the process of supervision and investigation, the exercise of the power of investigation does not point to the criminal behavior of the person under investigation at the beginning, but often 'follows the trail', that is, the fact of suspected crime is gradually discovered by minor illegal clues. The way of supervision investigation blurs the boundary between 'investigation' and 'criminal investigation', and it is difficult to judge when the investigation has entered the stage of 'criminal investigation' with the nature of investigation [3, 6]. It is also difficult to accurately judge whether the investigation measures and detention are aimed at the supervision

investigation or the criminal investigation, because it is impossible to accurately judge the time when the criminal investigation starts, which constitutes a technical problem of legal application.

2.2. The Simplicity of Compulsory Measures

The investigation coercive measure of supervisory committee is an important means to ensure the investigation power of supervisory committee. Compared with the five compulsory measures in the Criminal Procedure Law, such as detention, subpoena, guarantor pending trial, residential surveillance, detention, arrest and so on, the Supervision Law only provides the detention as a compulsory measure of investigation. From the nature and content of coercive measures, detention is similar to detention in Criminal Procedure Law. The single compulsory measures stipulated by the Supervision Law make it impossible for the supervision commission to select appropriate compulsory measures according to the seriousness of the case and the specific conditions of the investigated objects. Instead, it can only apply such strict compulsory measures, similar to detention, to all the investigated objects that need to be applied. This undoubtedly increases the risk of the commission's investigative procedures. For the investigated objects in the case with minor circumstances or those with a good attitude and a high degree of cooperation in the investigation, severe compulsory measures such as lien can also be applied [7, 8]. For example, during the period of detention, the risk of accidents (such as self-injury, suicide and diseases) as well as, the risk of state compensation for the respondents. One day of detention as provided for in paragraph 3 of Article 44 of the Supervision Law may be commuted to one day of criminal detention or fixed-term imprisonment. That is, the default detention of the Supervision Law is a fixed-term penalty of this treatment. When the crime investigated by the supervisory committee is determined to be innocent, the investigated objects who have been detained may apply for state compensation in accordance with the State Compensation Law.

2.3. The Hidden Worry of Supervision Centralism

As an important institutional innovation in national governance in recent years, the national supervision system reform has established a centralised national anti-corruption agency: supervision commission. At the same time, the supervisory commission and the Party discipline inspection organs work in the same office according to the way of 'two brands and a set of people, which further increases the supervisory commission's facto power and authority. "In accordance with the existing system design, the national supervisory authority prominent role in the national power system, has the functions of the power to supervise, the correction and the punishment (the disciplinary part) over the Administration, the justice and even legislation, and even legislation. There is not enough effective external restriction mechanism which can play a role of constraints of the

country's supervisory committee, except for the restriction mechanism whereby the people's congress elects a supervisory committee which is responsible to the former. The supervision of the power system with 'full coverage and no dead ends' means that the members of the people's congress and its organs are under supervision. Under such circumstances, it is doubtful whether the objects of supervision can form strong constraints on the subjects of supervision. [9]" Therefore, the supervisory commission which assumes the functions of all-directional and full-coverage supervision and has no obvious power restriction mechanism, has caused some worry that the so-called 'supervision centralism' may appear in the operation of the supervision system in the future. In view of the existing power configuration and operation practice, the supervisory authority's actual status is higher than that of administrative and procuratorial powers, which easily causes examination, prosecution and the judicial independence of procuratorial organ is restricted by the emergence of the so-called 'monitoring center' phenomenon [10]. Objectively speaking, these concerns may be exaggerated, but they are not entirely unreasonable. It should be said that, this kind of "supervision centralism" not only poses risks to the power of investigation of supervisory commissions, but also brings certain influence to the criminal justice system, supervision system and even the whole national governance.

3. The Internal Way to Optimize the Investigation Procedure of the Supervisory Commission

According to the above analysis, from the perspective of risk control, it is necessary to optimize the current investigation procedure of supervisory commission to prevent and control legal risks in the Investigation procedure of supervisory commission. Of course, as for the systemic risks of the potential "supervision centralism" may influence the supervision system and even the whole national governance system, it is advisable to seek institutional optimization countermeasures from a more macroscopic level, which will not be discussed in this paper. From the perspective of internal control, it is feasible to reduce the risk of investigation procedures by optimizing the self-supervision procedures within the supervisory committee.

First, we should strengthen the supervisory function of internal supervisory organs of supervisory commissions. Article 55 of the Supervision Law provides that "supervisory organs strengthen supervision over the performance of their duties and compliance with the law by setting up internal specialized supervisory organs, and build a loyal, clean and responsible supervisory team." According to the spirit of the provisions, combined with the internal management process of the supervisory committee, the scientific establishment of the internal supervisory body of the supervisory committee can give full play to the supervisory role of the internal supervisory body.

Second, we should strengthen the internal division of in the investigation activities of supervisory commissions. In accordance with the provisions of the Supervision Law on the content and procedures of the exercise of the power of investigation of supervisory commissions, and in light of the actual work of supervisory commissions, the internal division of supervisory commissions should be reflected through the internal process norms, the establishment of institutions and personnel division in the exercise of the power of investigation of supervisory commissions. For example, the examination and approval department, the executive department and the supervision department within a supervisory committee may be separated from each other. Departments examining and approving investigation plans shall not participate in the implementation of the investigation plans, nor shall they supervise the implementation of the investigation plans. The department that supervises the implementation of the investigation plan does not participate in the investigation plan and the approval of the investigation plan, etc.

Third, we should strictly enforce the system of supervision avoidance and the system of conflict of interest avoidance, and improve the compulsory measures for investigation by supervisory commissions [11]. Article 58 of the Supervision Law specifies the circumstances of the withdrawal from supervision. The second paragraph of Article 59 of the Supervision Law stipulates that "within three years after resignation and retirement, supervisors shall not engage in jobs related to supervision and judicial work that may cause conflicts of interest." In order to reduce the risk of operation of the power of investigation, the two provisions should be strictly implemented. At the same time, since the Supervision Law only stipulates the lien as a compulsory measure for the investigation of the supervisory commission, there is no way to realize the investigation power of the supervisory commission. Therefore, it should be considered that, the Supervision Law should be amended at an appropriate time, and other types of supervision committee investigation compulsory measures should be appropriately added in accordance with the provisions of the Criminal Procedure Law, so as to control the legal risks of supervision committee investigation.

4. The External Path to Optimization of the Investigation Procedure

Compared with the internal control of the supervisory commission, the external supervision of the investigative power of the supervisory commission can better play the function of preventing and controlling the legal risk [12]. Just as the procuratorial organ faces the problem of external supervision due to its excessive power, the supervisory organ also needs to be strengthened external supervision [13]. Based on the relevant provisions of China's current legislative system, judicial system and supervision law, we believe that we can strengthen the external supervision from the following

aspects.

First, we should strengthen the supervision of the People's Congress. The NPC is an organ of state power. Article 3 Paragraph 3 of the Constitution stipulates that, the state supervisory organs shall be formed by the People's Congresses and shall report their work to NPC. Therefore, there is sufficient legal basis and legitimacy for the People's Congress to exercise its supervisory power over the supervisory committee. Of course, according to the relevant provisions of the Supervision Law, the NPC itself is also the object of supervision by the supervisory commission. But this does not affect the NPC's supervision.

The Law of the People's Republic of China on Supervision by the Standing Committees of People's Congresses at all levels (hereinafter referred to as the Law of Supervision) provides seven modes of supervision, such as hearing and deliberating special work reports, checking the implementation of laws and regulations, and investigating specific problems. Article 53 of the Supervision Law provides that "supervisory commissions at various levels shall be subjected to supervision by the People's Congresses and their standing committees at the corresponding levels. The standing committees of People's Congresses at various levels hear and deliberate on special work reports of supervisory According to the provisions of Article 35, the way in which the NPC supervises supervisory committees includes hearing and deliberating special work reports, investigating and questioning law enforcement. These provisions provide a solid legal basis for the exercise of the power of supervision by the NPC.

Second, we should strengthen procuratorial supervision. In China, the procuratorial organ is the legal supervision organ stipulated by the Constitution. It is also the spirit of the Constitution. The legal supervision of procuratorial organs play an important role in ensuring the legitimacy of the investigation procedure and preventing the risk [14]. From the point of view of optimizing the investigation procedure of supervisory committee, we should strengthen the supervision of procuratorial organ. First of all, we should pay attention to the connection between the Supervision Law and the Criminal Procedure Law, which can add provisions on the investigation procedure of the supervision and supervision committee of the procuratorial organs, so as to provide concrete and operational legal basis for the procuratorial organs to exercise the power of supervision. We can maintain the current mixed mode that mixing the provision of investigation and criminal investigation, and to add procedures for filing or approving investigation transferred to an official crime investigation to clarify the supervisory committee investigation from investigation. We can change the mix mode by amending the relevant provisions of the Supervision Law. Second, it should be made clear that, procuratorial organs can and should supervise supervisory organs. The procuratorial organ is a legal supervision organ, which should conduct legal supervision on the investigation activities of the supervisory committee, which have the characteristics of substantial criminal investigation. At the same time, it should be made

clear that, the legal supervision of the procuratorial organ will not undermine the authority of the supervision organ as an authoritative anti-corruption agency. Article 127 of the Constitution and Paragraph 2 of Article 4 of the Supervision Law both stipulate that, “in handling cases of functionary violations and crimes, supervisory organs shall cooperate and restrict each other with the law-enforcement departments of the judicial and procuratorial organs.” The procuratorial organs may, in the process of examination and prosecution, exercise the supervisory function over the investigative activities of supervisory committees by excluding the evidence obtained from their investigations or by returning them for supplementary verification.

Third, we should attach importance to the role of lawyers. Defense is one of the basic functions of modern criminal procedure, and the right to defense is the basic human right enjoyed by the accused in modern criminal procedure [15]. Paragraph 3 of Article 33 of the Constitution provides that “the State respects and safeguards human rights”. The Criminal Procedure Law has also established the protection of human rights as a principle of criminal justice. In the current process of judicial reform, the role of lawyers in protecting human rights and preventing legal risks in criminal cases is attracting increasing attention. Opinions on Carrying out the Work of Duty Lawyers for Legal Aid (No. 37 [2015] issued by the General Office of the CPC Central Committee) Measures on carrying out the pilot work of full coverage of lawyers' defense in criminal Cases (Ministry of Justice of the Supreme People's Court, 2017) and other important documents have been issued successively. In the context of the gradual progress of human rights protection, the supervision procedure of should also be constructed in this direction to meet the increasing needs of human rights protection [3]. From the point of view of risk control of investigation power of supervisory committee, the investigation procedure of the supervisory committee should be optimized to enable lawyers to intervene in the investigation through the first paragraph of Article 33 of the Criminal Procedure Law. As mentioned in the paper, there are no fundamental legal obstacles for lawyers to intervene in the investigation of crimes committed by the supervisory commission, only some legal technical problems. Based on the provisions of the Supervision Law on the investigation procedures of supervisory commissions, we can specify the time nodes that the investigation behavior of supervisory committee changes from the investigation of illegal behavior to the investigation of duty crime. An additional filing or approval procedure shall be added to the procedural links such as preliminary nuclear filing and investigation in the procedure of the supervisory commission's power of investigation prescribed in Article 39. That is to say, after the initial investigation, when it is believed that the evidence of the investigation has pointed to the case constitutes a crime, not just the general violation of laws and disciplines, the case shall be put on file again (different from the previous filing, the first case filing is the one that initiates the investigation, while the second case filing is the one that transforms the investigation of violation of law and discipline

into the investigation of duty crime.) Of course, the approval procedure can also replace the filing procedure. In this way, the technical barrier of legal application for lawyers to intervene in the investigation of duty crimes of supervisory commission according to paragraph 1 of Article 33 of the Criminal Procedure Law will be eliminated.

Fourth, we should strengthen social supervision and relief mechanism construction. Article 54 of the Supervision Law provides that: “supervisory organs shall disclose supervisory information according to law and accept democratic supervision, social supervision and media's supervision.” According to Article 54 of the Supervision Law, we may encourage the public to participate in the supervision and supervision committee through the internal procedures of the supervision right operation, such as to supervise the internal work standards and work procedures of the supervision organ and put forward suggestions for the supervision work, and establish various reporting mechanisms and reward mechanisms, such as the telephone and network, ect. The legal risk of the operation of the power of investigation of supervisory committee is reduced by strengthening social supervision.

At the same time, the function of the supervisory right relief mechanism should be brought into play. Article 57 of the Supervision Law stipulates that, the investigated objects and their close relatives can appeal to the supervisory organs if they think their rights have been infringed during the investigation by supervisory commissions, and they may also apply to the supervisory organs at higher levels for review of the supervisory rights relief mechanisms if they are not satisfied with the appeal. The right relief mechanism can also obtain the supervisory function. Therefore, we can reduce the risk of the operation of the supervisory commission's power of investigation by ensuring the effective operation of the supervisory right relief mechanism.

5. Conclusion

This paper starts with the legal theory of risk control, analyzes and explains the risk problems of the investigation procedure of supervisory commission,. In the practice of the operation of the national supervision system, lawyers at the investigation stage have not yet been able to achieve; the unity of compulsory measures, the Supervision Law only provides for a lien as a compulsory investigation. At the same time, the supervisory committee, which undertakes all-round and full-coverage supervision functions and has no obvious power restriction mechanism to restrict it, is worried that so-called supervisory centralism may appear in the operation of the supervision system in the future. And on this basis, through internal control and external supervision, so as to prevent legal risks in the investigation operation of supervisory committee. From the perspective of internal control, the goal of reducing the risk of investigation procedures is achieved by optimizing the internal self-supervision procedures of the supervisory committee. Compared with the internal control of the Supervisory Committee, the external supervision of the

Supervisory Committee's investigative power is more capable of preventing and controlling the legal risk of the operation of the Supervisory Committee's investigative power. It is necessary to strengthen the supervision of the people's congress, the supervision of the procuratorial organs that undertake the function of legal supervision, and more importantly, give full play to the role of lawyers in protecting human rights and preventing legal risks.

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